No. 99-816

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IN THE

Supreme Court of the United States

JUDITH M. KOENICK,

Petitioner,

v.

REGINALD M. FELTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Maryland statute establishing the holidays for public schools, including from "[t]he Friday before Easter and from then through the Monday after Easter," violate the Establishment Clause?

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Respondents, Reginald M. Felton, President of the Board of Education of Montgomery County, Maryland, and Dr. Jerry D. Weast, Superintendent of Schools for Montgomery County (hereinafter collectively "Board of Education") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the of the Fourth Circuit's opinion in this case, which is reported at 190 F.3d 259.

REASONS FOR DENYING THE WRIT[1]

The petition for a writ of certiorari filed by Judith M Koenick ("Ms. Koenick") should be denied because she (1) presents a question that is not the one decided by the Fourth Circuit; (2) seriously mischaracterizes the nature of the statute attacked by her in order to be able to rely upon authority dealing with a materially different species of statute; (3) conjures up notions of conflict between the circuits and decisional chaos when none exists; and (4) lacks standing. When the actual question decided by the Fourth Circuit is considered and the full text of the Maryland statute at issue examined, the inevitable conclusion is that this case is one involving the routine application of well-developed principles of law that is simply not worthy of review by this Court, and certainly not at the behest of a petitioner lacking standing.

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1. The petition in this case includes an accurate description of the opinions below, the parties to the case, the jurisdiction of this Court and the text of applicable constitutional and statutory provisions. Although the Board of Education disagrees with certain portions of the Statement of the Case, any corrections or misstatements are noted below.

I. THE QUESTION PRESENTED BY THE PETITION DIFFERS MATERIALLY FROM THE ISSUE THAT WAS DECIDED BY THE FOURTH CIRCUIT.

In her petition, Ms. Koenick posits the question presented as being whether "the Establishment Clause permits a state to require all public schools to close on Good Friday." This is simply not the issue presented by this case.

The Maryland statute at issue does not even mention Good Friday, much less encourage students to worship or even consider any religious significance of Good Friday. Rather, the statute provides for the closure of public schools from the Friday before through and including the Monday after Easter. This four-day break is fully supported by secular reasons contained in the record, including predictable absenteeism on these days among both teachers and students that could disrupt the educational program.[2] The same section of Maryland law which establishes this four-day Easter or spring break also provides, *inter alia*, for the closure of public schools on Thanksgiving day and the day after and on Christmas Eve through January 1. Maryland Code Ann., Educ. § 7-103(c) (1999).[3] The statute makes no mention of religion or worship and, at most, is a permissible accomodation of religion.

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2. In light of the high rate of absenteeism of students and teachers on the Jewish holidays of Yom Kippur and Rash Hashanah, the Board of Education also closes its schools on those days in order to economize the scarce educational resources that would be wasted if classes were held on those days.

3. The text of the statute is set forth on p. 3 of the petition.

The proper characterization of the four-day Easter or spring break provided by § 7-103(c) is not a matter of semantics. This Court has repeatedly explained that in analyzing Establishment Clause claims, "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., *concurring*). The semantics involved in Ms. Koenick's formulation of the question presented are also no accident for, as will be explained below, she finds greater solace in decisions involving materially different statutory provisions that include overt state encouragement of worship on Good Friday.

In short, if this Court were to grant the petition, the issue before this Court would be materially different from the question presented by Ms. Koenick. Accordingly, the Board of Education has restated the question on the first page of this brief in opposition in order to provide this Court with an accurate description of the rather pedestrian issue presented by the petition.

II. BY IMPROPERLY CHARACTERIZING § 7-103(c) AS CREATING A PUBLIC SCHOOL HOLIDAY FOR "GOOD FRIDAY," THE PETITIONER DISTORTS THE NATURE OF THIS CASE.

In her petition, Ms. Koenick consistently mischaracterizes the public school holiday established by § 7-103(c) as simply creating a public school holiday for "Good Friday." Relying on this mischaracterization of § 7-103(c), Ms. Koenick then relies on a single decision from

the Seventh Circuit, *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and baldly proclaims that there is a great conflict among the circuits that warrants granting certiorari in this case. Ms. Koenick's characterization of § 7-103(c) as a "Good Friday" statute is misplaced, and consequently, so is her reliance on *Metzl* and the other "Good Friday" Establishment Clause cases cited by her.

By placing heavy emphasis upon the fact that public schools are closed on, in her words, "Good Friday," Ms. Koenick misconstrues, distorts and ignores the express language of § 7-103(c), which simply establishes a four-day break anchored around Easter, a day, like Christmas, of undeniable religious significance but which also has acquired over the years numerous secular trappings. The correct context of this law is that, as part of a broader statute establishing days on which public schools are open or closed, it provides for a four-day Easter or spring break. This mirrors the nine-day Christmas break, and is similar to the four-day Thanksgiving break, which are also established for public schools by § 7-103(c).

Finally, in characterizing § 7-103(c) as simply a "Good Friday" statute, Ms. Koenick fails to take into account or even discuss the inclusion of the Monday after Easter as the end point of the four-day Easter or spring break. As Ms. Koenick conceded, and the district court found, there is virtually no recognized religious significance to the Monday after Easter, and in fact, the Monday after Easter has no more recognized religious significance than any Sunday or December 28 or December 29.

In short, Ms. Koenick's mischaracterization of § 7-103(c) as a statute closing public schools in Maryland

for "Good Friday" to promote or facilitate observance of that Christian holy day is a wholly unfounded effort to force fit the facts of this case into those of cases more to her liking. Consequently, her reliance on the smorgasbord of Establishment Clause cases that involve public school holidays or other governmental activities ***solely*** on Good Friday, including the principal case upon which she relies in her petition, *Metzl v. Leininger*, is misplaced.

III. THERE IS NO DIVISION AMONG THE CIRCUITS AS TO THE CONSTITUTIONALITY OF, OR THE PROPER TEST TO BE APPLIED TO, STATUTES ESTABLISHING "GOOD FRIDAY" AS EITHER A LEGAL HOLIDAY OR A PUBLIC SCHOOL HOLIDAY.

As her principal argument in support of granting the petition, Ms. Koenick asserts that lower courts are deeply divided on the constitutionality of establishing a public school holiday or legal holiday on "Good Friday." Even assuming the applicability of decisions which involve a public school holiday or other accommodation on solely Good Friday, *see supra* Section 2 of this Brief in Opposition, there is, in fact, no great division among the circuits regarding the constitutionality of those statutes or similar type accommodations. To the contrary, all of the decisions mentioned in the petition compel the conclusion that the Fourth Circuit's analysis regarding the constitutionality of § 7-103(c) was consistent with the decisions of other circuits and this Court, and not evidence of a chaotic division in the decisions of lower courts.

The principal case relied on by Ms. Koenick for her argument that there is a great divide among the circuits is

Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995), in which the Seventh Circuit held that a 1941 Illinois statute expressly establishing "Good Friday" as a school holiday violated the Establishment Clause. Ms. Koenick's reliance on *Metzl* as establishing a split among the circuits is misplaced for several reasons.

First, in stark contrast to the statute at issue in this case, there was legislative history related to the Illinois "Good Friday" statute indicating that it was enacted to promote the Christian holy day of "Good Friday." 57 F.3d at 619. In analyzing the Illinois Good Friday statute under the *Lemon* test, the Seventh Circuit simply determined that there was an absence of evidence establishing any secular purpose advanced in support of the statute (in sharp contrast to this case) and accordingly, it transgressed the Establishment Clause. 57 F.3d at 623. The Seventh Circuit expressly noted that had Illinois produced evidence to show that public schools were closed on the Friday before Easter in order to give students and teachers a three-day Spring weekend, rather than to commemorate the crucifixion of Jesus Christ, it would be analyzing a different case. *Id.*

On the other hand, there have been a number of decisions by circuits, including the Fourth Circuit in this case, in which state statutes establishing the Friday before Easter as either a public school holiday, legal holiday or other similar activity, have been analyzed under the *Lemon* test and upheld against Establishment Clause challenges. *See Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir.), *reh'g en banc denied*, (7th Cir. 1999), *petition for cert. filed*, (Nov. 12, 1999); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *reh'g en banc denied*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992).

However, unlike *Metzl*, the opinions in *Bridenbaugh, Granzeier and Cammack* each determined that the state statute or challenged conduct at issue in each of the respective cases was supported by unrefuted secular purposes and that the state statute or challenged conduct passed constitutional muster under the three-part test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Bridenbaugh*, 185 F.3d at 799-801 (Seventh Circuit, relying on its previous decision in *Metzl*, concluded that Indiana state statute establishing Good Friday as a legal holiday had a valid secular justification of providing a long spring weekend for state employees); *Granzeier*, 173 F.3d 573-74 (in rejecting challenge to the closing of various Kentucky state and county courts and court-related offices on Good Friday, Sixth Circuit determined that numerous secular purposes supported closing the state and county courts and court-related offices, including that many school children were on spring vacation the following week and that many Kentucky families start their vacations early on Good Friday);[4] *Cammack*, 932 F.2d at 775-77 (Ninth Circuit rejected challenge to Hawaii statute which declared Good Friday to be a legal holiday finding that the statute accomplished a secular purpose of providing Hawaiians with a legal holiday, labor unions were the most ardent supporters of the statute, the statute was not motivated by a wholly religious purpose, and the primary effect of the statute was not the advancement of Christianity).

Notwithstanding the now rather routine application by the circuits of the *Lemon* test, or some variant of it, to statutes that establish legal holidays, public school holidays or some

4. In *Granzeier*, the Sixth Circuit treated the "endorsement" test suggested in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J. *concurring*), as a refinement or clarification of the *Lemon* test.

other accommodation on Good Friday, and even though this case does not relate solely to Good Friday or promote or encourage worship, the petitioner asks this court to grant certiorari in this case in order to establish strict scrutiny as the appropriate test for such governmental conduct. (Pet. at 18). In her petition, Ms. Koenick argues that § 7-103(c) facially prefers the Christian faith over other faiths or nonfaith and that it should be invalidated under the strict scrutiny test applied by this Court in *Larson v. Valente*, 456 U.S. 228, 246 (1982). Ms. Koenick's invitation to grant certiorari to reach this issue is ill-founded for several reasons.

As the district court in this case recognized, no reported decision has ever applied a strict scrutiny test in an Establishment Clause case involving government recognition, in any form, of holidays that were once, or are presently, religiously based. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Bridenbaugh*, 185 F.3d 796 (7th Cir. 1999); *Granzeier*, 173 F.3d 568 (6th Cir. 1999); *Metzl*, 57 F.3d 618 (7th Cir. 1995); *Cammack*, 932 F.2d 765 (9th Cir. 1991); *Freedom of Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wisc. 1996); *Mandel v. Hodges*, 127 Cal. Rptr. 244 (Cal. Ct. App. 1976); *Griswold Inn, Inc. v. Connecticut*, 441 A.2d 16 (Conn. 1981).

Furthermore, to apply strict scrutiny (instead of the *Lemon* test) in a case such as this would overturn several well-established tenets of Establishment Clause jurisprudence enunciated by this Court.

First, to apply strict scrutiny in this case would require focusing exclusively on the religious component of § 7-103(c) which, as this court has noted, would inevitably

lead to invalidation under the Establishment Clause. *See Lynch*, 465 U.S. at 680. As this Court noted in *Lynch*, "[w]ere the test that government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." 465 U.S. at 681 n.6.

Second, to apply strict scrutiny to statutes such as § 7-103(c) would attribute unconstitutional motives to statutes when a plausible secular purpose for the statute could be discerned from the face of it. *See Muller v. Allen*, 463 U.S. 388, 394-94 (1983). Moreover, even if one were to assume that the primary purpose of § 7-103(c) at the time of its original enactment in 1865 was to encourage people to observe Easter, this fact alone does not establish that the statute presently has a religious purpose, nor would this fact invalidate the statute, as the purpose for such a law may have changed over 130 years. *See McGowan v. Maryland*, 366 U.S. 420 (1961).

Accordingly, this Court has repeatedly noted that a state may accommodate religion without violating the Establishment Clause. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

This Court's Establishment Clause jurisprudence plainly does not support the application of strict scrutiny to § 7-103(c) in this case. Nor have any of the circuits evinced the desire to apply the strict scrutiny test in similar cases. *See Metzl*; *Bridenbaugh*; *Granzeier*; *and Cammack*. Accordingly, this case does warrant granting the petition to undertake any such analysis. The standard to be applied is well-settled and need not be revisited.

In short, there is no division among the circuits as to the constitutionality of, or the proper test to be applied to, statutes such as § 7-103(c), which establish legal holidays or a public school holidays on days having undisputed religious origins, such as Thanksgiving, Christmas, Easter or Good Friday.

IV. AS THE FOURTH CIRCUIT DETERMINED, § 7-103(c) IS UNASSAILABLE ON THE MERITS, AND ITS DECISION INVOLVED ROUTINE APPLICATION OF SETTLED PRINCIPLES THAT DO NOT WARRANT REVIEW BY THIS COURT.

Under existing, relevant Establishment Clause jurisprudence, § 7-103(c) easily passes constitutional muster. Under *Lemon*, the governmental action in question (1) must have a secular purpose; (2) not have the principal or primary effect of advancing or inhibiting religion; and (3) not foster an excessive entanglement with religion. 403 U.S. at 612-13.

There are numerous secular purposes supporting § 7-103(c), including that (1) closing schools on the Friday before and the Monday after Easter is appropriate because of the expected high rate of absenteeism among both students and teachers; (2) absences disrupt the effectiveness of instruction and require substantial expenses to be incurred for hiring substitute teachers; (3) absences result in wasting valuable and limited educational resources; and (4) uniformity is desirable in scheduling a four-day Spring break for all Maryland public schools at a time of year when many Americans, including Marylanders, will travel away from

home in order to celebrate Easter or to take a Spring vacation.[5]

With respect to the second prong of the *Lemon* test, § 7-103(c) does not have the principal or primary effect of advancing or inhibiting religion. *See* 190 F.3d at 267. As the Fourth Circuit noted, § 7-103(c) does not express any preference toward the practitioners of any one faith over any other, nor does the statute endorse or advance a particular religion or religion generally. *Id.* As the Fourth Circuit also noted, § 7-103(c) does not grant an added benefit to members of one faith that it does not grant to everyone, but rather merely gives students, teachers, and families the days off to spend as they like. *Id.* In fact, § 7-103(c) is far more innocuous than the City of Pawtucket's inclusion of a nativity scene in its annual Christmas display, which this Court held passed constitutional muster. *See Lynch v. Donnelley*, 465 U.S. 668 (1984).

The four-day Easter or spring break established in § 7-103(c) during which time students, teachers, and families can vacation, celebrate Easter, participate in numerous Easter-related secular activities, or travel is no different than the four-day Thanksgiving and nine-day Christmas breaks embodied in the same statute. Moreover, there is no emphasis placed by § 7-103(c) on "Good Friday" but rather, the four-day break is anchored around the increasingly secularized holiday of Easter, which is a traditional time for Marylanders, like many other Americans, to begin Easter-related travel.

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5. As noted above in footnote 2, the same concerns over predictable absenteeism of students and teachers on the Jewish holidays of Yom Kippur and Rash Hashanah has caused the Board of Education to close its schools on those days.

As to whether § 7-103(c) causes excessive government entanglement with religion, Ms. Koenick makes the specious argument that § 7-103(c) causes excessive entanglement because Eastern and Western Christianity observe Easter on different days of the year and that state officials, such as the Board of Education, are forced to divine the "official" Easter.

Although Eastern and Western Christianity celebrate Easter on different calendar days, this is no different than their celebration of Christmas, which likewise occurs on different calendar days. *See County of Allegheny v. ACLU*, 492 U.S. at 579 n.2. Unlike the "comprehensive" and "continuing" surveillance that this Court has determined results in excessive entanglement in cases involving statutes providing government aid to church-related elementary and secondary schools and their teachers, there is simply no similar type interaction or contact required by § 7-103(c).

As the Fourth Circuit recognized, the Board of Education simply consults commercially printed calendars to determine the date that Easter is celebrated each Spring. This type of conduct by the Board of Education simply does not rise to the type of "comprehensive, discriminating and continuing state surveillance" prohibited by the entanglement prong of *Lemon*. *See Lynch v. Donnelly*, 465 U.S. at 684.

V. MS. KOENICK LACKS STANDING TO PURSUE HER ESTABLISHMENT CLAUSE CLAIMS.

Ms. Koenick is no longer employed by the Board of Education, and she has not pursued her equal protection claim in her petition. However, relying on her status as a taxpayer, she continues to pursue her Establishment Clause claim, and the Fourth Circuit ruled that she had standing to do so, citing

the "expenditures of her tax revenues toward the paid holiday on the Friday before and the Monday after Easter for public school employees." 190 F.3d at 263. There is nothing in the record to support this observation by the Fourth Circuit, and Maryland law expressly refutes any notion of additional public expenditures for the closure of schools on the Friday and Monday in question.

Section 7-103(c) is part of a larger statutory section which sets forth the parameters by which all public school systems in Maryland must establish their annual school calendar, including defining the required number of school days and holidays. Section 7-103(a) mandates that public schools be open for 180 school days a year, for a minimum of 1,080 hours during a 10-month period in each school year, and that they may not be open on Saturdays, Sundays or statutory holidays, including the two days at issue in this case. Local boards of education in Maryland, in accordance with the statutory mandate, select 180 instructional days out of the 365 days in each year. All that § 7-103(c) does is to direct local boards of education not to select Saturdays, Sundays or state holidays when choosing the 180 days on which they will operate. Accordingly, there is simply no basis for concluding that additional taxpayer dollars are required in connection with the closure of schools on the two days at issue in this case.

Accordingly, under this Court's applicable precedents, Ms. Koenick lacks standing to pursue her Establishment Clause claim because she cannot point to any expenditure of public tax revenues for the closure of schools on the two days in question. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

CONCLUSION

The question Ms. Koenick presents and the statute that she attacks have been distorted to fit jurisprudence that otherwise does not support her position. Simply put, this case does not present an appropriate vehicle for examination of the issue that she presents, but rather represents the routine and pedestrian application of well-developed principles of law.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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